

# EXHIBIT 38

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1 UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3 SAN JOSE DIVISION

4 FINJAN, INC, A DELAWARE  
CORPORATION,

5 CASE NO. CV-13-03999-BLF

6 PLAINTIFF,

7 VS.

8 BLUE COAT SYSTEMS, INC., A  
DELAWARE CORPORATION,

9 VOLUME 2

10 DEFENDANT. PAGES 205 - 417

11 SEALED PAGES 298-299

12 TRANSCRIPT OF TRIAL  
13 BEFORE THE HONORABLE BETH LABSON FREEMAN  
14 UNITED STATES DISTRICT JUDGE AND A JURY

15 A-P-P-E-A-R-A-N-C-E-S

16 FOR THE PLAINTIFF: KRAMER, LEVIN, NAFTALIS & FRANKEL,  
LLP

17 BY: PAUL J. ANDRE  
LISA KOBIALKA  
JAMES HANNAH  
KRISTOPHER KASTENS  
HANNAH LEE  
990 MARSH ROAD  
MENLO PARK, CALIFORNIA 94025

18 FOR THE DEFENDANT: WILSON, SONSINI, GOODRICH & ROSATI  
BY: EDWARD POPLAWSKI  
OLIVIA KIM  
VERA ELSON  
633 WEST FIFTH STREET, 15TH FLOOR  
LOS ANGELES, CALIFORNIA 90071

19 (APPEARANCES CONTINUED ON THE NEXT PAGE.)

20 OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

21 PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,  
22 TRANSCRIPT PRODUCED WITH COMPUTER.

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1 APPEARANCES: (CONT')

2 FOR INTEL: KIRKLAND & ELLIS  
BY: JASON CHOY  
333 SOUTH HOPE STREET  
LOS ANGELES, CALIFORNIA  
90071

5 ALSO PRESENT:  
JIM HOY  
GEOFF THOMAS  
PHIL HARTSTEIN  
JULIE MAR-SPINOLA

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8 DAVID R. KROLL  
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10 VIDEO DEPOSITION OF SHLOMO TOUBOUL P. 366

11 HARRY BIMS  
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05:00 1 AS LUCRATIVE. IN FACT, THAT'S WHERE WE STARTED TO ACHIEVE

05:00 2 PROFITABILITY. IT ACTUALLY PAID BACK THOSE THAT INVESTED IN

05:00 3 THE COMPANY.

05:00 4 Q. AND THOSE WHO INVESTED IN THE COMPANY, ARE THEY STILL

05:00 5 INVOLVED WITH THE COMPANY TODAY?

05:00 6 A. SO THE COMPANY'S ORIGINAL VENTURE CAPITAL INVESTORS AND

05:00 7 CORPORATE OWNERS LIKE CISCO AND MICROSOFT, WHEN WE ACTUALLY

05:00 8 BECAME A NASDAQ COMPANY, THEY OWNED 90 PERCENT OF OUR PUBLIC

05:00 9 COMPANY.

05:00 10 SO THE SAME PEOPLE WHO GAVE FINJAN MONEY AND GAVE SHLOMO

05:00 11 MONEY TO FUND THE COMPANY STILL TODAY UNDER MY LEADERSHIP ARE

05:00 12 EQUITY OWNERS IN THE COMPANY.

05:00 13 Q. AND WHAT DOES THAT TELL YOU ABOUT FINJAN?

05:00 14 A. IT TELLS US IT IS THE SAME FINJAN WE WERE WHEN WE WERE

05:00 15 DEVELOPING THOSE PRODUCTS AND THE SAME FINJAN WE WERE WHEN WE

05:00 16 WERE LICENSING THAT TECHNOLOGY AND THOSE PATENTS.

05:01 17 Q. THANK YOU.

05:01 18 I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

05:01 19 THE COURT: ANY FURTHER QUESTIONS FOR THIS WITNESS?

05:01 20 MR. POPLAWSKI: JUST VERY BRIEFLY, YOUR HONOR.

05:01 21 **RE-CROSS-EXAMINATION**

05:01 22 BY MR. POPLAWSKI:

05:01 23 Q. I'D LIKE TO FOLLOW UP WITH YOU, MR. HARTSTEIN, ON YOUR

05:01 24 DISCUSSION WITH MR. ANDRE ABOUT THE 2002 OEM AGREEMENT AND

05:01 25 LOOKING FORWARD TO 2013.

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05:01 1 YOU'RE NOT IN ANY POSITION TO INTERPRET OR EXPLAIN THAT

05:01 2 OEM LICENSE AGREEMENT; RIGHT?

05:01 3 A. I DON'T BELIEVE, NO.

05:01 4 Q. AND YOU UNDERSTAND THAT FINJAN WAITED TEN YEARS TO SUE

05:01 5 BLUE COAT FROM THE TIME THAT THE OEM AGREEMENT WAS TERMINATED

05:01 6 IN 2003?

05:01 7 A. I'M NOT SURE THOSE TWO ARE CONNECTED.

05:01 8 Q. OKAY. WOULD YOU PUT UP DEMONSTRATIVE H-9, PLEASE.

05:02 9 NOW, WE'VE AGREED THAT FINJAN AND BLUE COAT HAD AN OEM

05:02 10 AGREEMENT IN 2002; RIGHT?

05:02 11 A. YES.

05:02 12 Q. AND IN 2005 FINJAN REVERSE ENGINEERED OR PICKED APART

05:02 13 BLUE COAT'S PRODUCTS; RIGHT?

05:02 14 MR. ANDRE: OBJECTION, YOUR HONOR. OUTSIDE OF THE

05:02 15 SCOPE OF EVEN MY REDIRECT.

05:02 16 THE COURT: SUSTAINED.

05:02 17 MR. ANDRE: THANK YOU.

05:02 18 MR. POPLAWSKI: OKAY. NO FURTHER QUESTIONS, YOUR

05:02 19 HONOR.

05:02 20 THE COURT: THANK YOU. IS THAT EVERYTHING FOR THIS

05:02 21 WITNESS, MR. ANDRE?

05:02 22 MR. ANDRE: IT IS, YOUR HONOR. THANK YOU.

05:02 23 THE COURT: MR. HARTSTEIN, THANK YOU FOR YOUR

05:02 24 TESTIMONY. YOU MAY GO BACK TO YOUR SEAT.

05:02 25 AND IS THIS WITNESS EXCUSED?

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05:02 1 MR. ANDRE: YES, YOUR HONOR.

05:02 2 THE COURT: MR. HARTSTEIN, YOU'RE ALSO FREE TO GO.

05:02 3 MS. KOBIALKA, YOUR NEXT WITNESS.

05:02 4 MS. KOBIALKA: YES. AT THIS TIME WE WOULD LIKE TO

05:02 5 CALL DAVID KROLL.

05:03 6 THE COURT: MR. KROLL, IF YOU COULD COME FORWARD TO

05:03 7 THE WITNESS STAND AND RAISE YOUR RIGHT HAND TO BE SWORN.

05:03 8 THE CLERK: RAISE YOUR RIGHT HAND.

05:03 9 **(PLAINTIFF'S WITNESS, DAVID R. KROLL, WAS SWORN.)**

05:03 10 THE WITNESS: YES.

05:03 11 THE CLERK: PLEASE BE SEATED. IF YOU WOULD STATE

05:03 12 YOUR NAME AND SPELL YOUR LAST NAME FOR THE REPORT.

05:03 13 THE WITNESS: SURE. DAVID ROSS KROLL, K-R-O-L-L.

05:03 14 **DIRECT EXAMINATION**

05:03 15 BY MS. KOBIALKA:

05:03 16 Q. MR. KROLL, ARE YOU AN INVENTOR ON THE FINJAN '633 AND '822

05:03 17 PATENTS?

05:03 18 A. YES.

05:03 19 Q. I'D LIKE TO PULL UP JTX 2004, WHICH IS THE '822 PATENTS.

05:03 20 AND MAY I MOVE THAT -- PUBLISH THAT TO THE JURY?

05:03 21 THE COURT: YES. WHAT NUMBER WAS THAT AGAIN?

05:03 22 MS. KOBIALKA: JTX 2004.

05:03 23 THE COURT: 2004, THANK YOU.

05:03 24 BY MS. KOBIALKA:

05:03 25 Q. AND DO YOU SEE JTX 2004?

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05:04 1 A. I DO, YES.

05:04 2 Q. AND IS THAT YOUR NAME WITH THE INVESTORS LISTED ON THE

05:04 3 FRONT PAGE OF THAT DOCUMENT?

05:04 4 A. YES.

05:04 5 Q. AND I'D LIKE TO TURN TO JTX 2006 WHICH IS THE '633 PATENT.

05:04 6 MAY I PUBLISH IT TO THE JURY, TOO, AS WELL?

05:04 7 THE COURT: YES.

05:04 8 MS. KOBIALKA: THANK YOU.

05:04 9 Q. AND ARE YOU THE MR. KROLL THAT IS LISTED ON THE FRONT PAGE

05:04 10 OF THE '633 PATENT WHICH IS MARKED AS JTX 2006?

05:04 11 A. YES, I AM.

05:04 12 Q. WHERE DO YOU CURRENTLY WORK, MR. KROLL?

05:04 13 A. I WORK AT RACKSPACE.

05:04 14 Q. AND WHAT IS YOUR POSITION THERE?

05:04 15 A. VICE PRESIDENT OF GLOBAL COMMUNICATIONS.

05:04 16 Q. AND PRIOR TO WORKING AT RACKSPACE, WHERE DID YOU WORK?

05:04 17 A. I WORKED AT ADVANCED MICRO DEVICES, E-TRADE, FINJAN

05:04 18 SOFTWARE, CUNNINGHAM COMMUNICATION.

05:04 19 Q. WELL, WHAT AREA IS YOUR WORK EXPERIENCE IN?

05:04 20 A. IT'S MAINLY IN MARKETING AND COMMUNICATIONS.

05:04 21 Q. AND FOR HOW MANY YEARS HAVE YOU BEEN DOING THAT?

05:04 22 A. TWENTY-FIVE.

05:04 23 Q. AND CAN YOU BRIEFLY JUST DESCRIBE YOUR EDUCATIONAL

05:04 24 BACKGROUND?

05:04 25 A. SURE. I HAVE A SPEECH COMMUNICATION AND MARKETING DEGREE

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